IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 613 OF 1989

1. Dattu Hari Mali @ Dattu
   Rau Mali, since deceased
   by his legal heirs :
   a) Hansabai Dattu Mali,
   b) Bhagwan Dattu Mali,
   c) Mrs. Malan Sudam Bhujbal,
   d) Mrs. Sunder Shivaji Raut,
   e) Sindhu Rajaram Mali,
   f) Mrs. Usha Rajan Korde,
2. Rajaram Ram Mali @ Rajaram
   Rau Mali, since deceased
   by his heirs :
   A) Smt. Parvati Rajaram Mali,
   B) Ganpati Rajaram Mali,
   C) Raghunath Rajaram Mali,
   D) Shashikala Raghunath Jagtap,
   E) Indutai Manohar Tambe,
   F) Sanjay Rajaram Mali,
3. Ankush Dhondu Mali. ... Petitioners

versus

Peer Alli Darga Masjid (Powali

Peer) through its Vahiwatdar :
Noor Mohamad Papa Mujawar (Mulani)
since deceased by his heirs :
Mukhtar Noor Mohamad Mujawar
(Mulani). ... Respondent

...

Mr. S.G. Karandikar, for the Petitioners.
Mr. P.L. Naik, for the Respondent.

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CORAM : A.M.KHANWILKAR,J.

22nd June 2004

ORAL JUDGMENT :

. This petition under Article 227 of the Constitution of India takes exception to the judgment and order passed by the Sub-Divisional Officer, Phaltan Division, Phaltan, dated April 3, 1987 in Tenancy Case No. 1 of 1981. Briefly stated, the land in question is Survey No. 609, Hissa No. 1 to 5, situated at village Khatav, taluka Khatav, district Satara, totally admeasuring about 7 acres. The predecessor of the Petitioners was inducted in the suit land as permanent tenant (Mirashi tenant) under

Registered Mirashi Patra dated July 2, 1889. The Respondents claim to be a public trust duly registered under the provisions of Bombay Public Trusts Act, 1950 some time on May 29, 1955. As no proceedings for possession were pending between the parties on the tillers' day, inquiry under section 32G of the Bombay Tenancy and Agricultural Lands Act was commenced in the year 1962 on the assumption that the tenant has become deemed purchaser on the tillers' day, i.e., 1st April 1957. In the said proceedings, after hearing both sides, purchase price was determined by two separate orders dated March 15, 1962. Pursuant to the said order, the tenant deposited the purchase price in the Government Treasury on June 4, 1962 and on March 13, 1963. It is much thereafter an application was addressed to the Chief Minister by one Shri A.N. Dange, pursuant to which fresh inquiry under section 32G of the Act was commenced in the year 1969. However, the tenancy authorities by order dated January 26, 1970 preferred to drop section 32G proceedings, taking the view that the earlier inquiry was void ab initio. Against this decision, matter was carried in appeal by the tenant and the appellate

authority allowed the appeal by judgment and order dated October 28, 1970. The landlords filed revision which was allowed by the Maharashtra Revenue Tribunal by judgment and order dated February 8, 1973, restoring the order of Tahsildar dated January 26, 1970, dropping section 32G proceedings. In the circumstances, the Petitioners preferred writ petition before this Court being Special Civil Application No. 1840 of 1973. The said writ petition, however, came to be allowed by judgment and order dated 14th and 15th December 1978. This Court took the view that if section 88B exemption proceedings were pending, the proceedings under section 32G of the Act will have to wait till the outcome of the said application. This Court observed that the Respondent being public trust was entitled to apply for exemption certificate under section 88B of the Act. Both parties appearing before this Court admitted that the trust had not submitted such application contemplated by Rule 52 to the Collector before commencement of the proceedings under section 32G of the Act. In the circumstances, this Court remanded the case to the Additional Tahsildar to decide the same in

accordance with law giving opportunity to the Respondent Trust to make an application to the Collector as contemplated by section 88B(2) of the Act, which application be decided in accordance with law. After the said remand, the present proceedings being Tenancy Case No. 1 of 1981 were commenced before the Sub-Divisional Officer, Phaltan Division, Phaltan, for granting exemption certificate in favour of the Respondent under section 88B of the Act in respect of the suit lands. This application was opposed by the Petitioners essentially on two grounds. It was firstly contended that the present application was incompetent and untenable, because similar application was already filed by the Respondent Trust, which has been dismissed on 30th March 1970. It was also contended that, in any case, the Respondent Trust would not satisfy the requirements of section 88B, so as to be entitled for issuance of exemption certificate. Insofar as the first contention is concerned, the Sub-Divisional Officer negatived the same holding that principles of res judicata will not apply in the present case, as the application has been dismissed for default. He further held that the

application will have to be considered on merits in terms of the observations of the High Court. Insofar as the merits are concerned, the Sub-Divisional Officer answered the issue by observing thus :

> " . . . The Opponent No. 3 has admitted this Deosthan and as public (trust) Deosthan. The applicant kept the account of the expenditure and it is got verified. From the evidence produced by the applicant it is clear that the applicant has fulfilled all the provision of 88-B and the case is fit for issue (of) an exemption certificate. Accordingly, I pass the following order."

Against this decision, the matter was carried in revision by the Petitioners, which, however, has been returned to the Petitioners by the Tribunal being not maintainable. In the circumstances, present writ petition has been filed questioning the correctness of order passed by the Sub-Divisional Officer dated April 3, 1987.

2. Mr. Karandikar, for the Petitioners, submits that the present application for issuance of exemption certificate under section 88B of the Act filed by the Respondents was incompetent and untenable in law. He submits that the Respondent had filed application for similar relief in the past, which was admittedly dismissed for default on 30th March 1970. He further submits that it now transpires that another similar application was filed by the Respondent on 1st December 1972 and the status of that application is not disclosed by the Respondent. According to him, a fresh application as filed by the Respondent is untenable on the principles analogous to O.9, r.9, C.P.C. To support this proposition, reliance is placed on the decision of our High Court reported in A.I.R. 1971 Bom. 295 in the case Trimbak Purushottam Patil v. Yashodabai. He submits that the authority below has misdirected itself in proceeding on the assumption that it was obliged to decide the application on merits and not to dismiss the same as not maintainable in the light of the remand order passed by the High Court. The learned Counsel further contends that the order as passed

by the Sub-Divisional Officer cannot be sustained even on merits as no satisfaction as required to be reached in terms of section 88B(2) of the Act - that the entire income of the suit lands is appropriated for the purposes of the trust is recorded; and in absence of such satisfaction, no certificate can be issued in favour of the Respondents. Mr. Karandikar further contends that even the Maharashtra Revenue Tribunal misdirected itself in returning the revision application as preferred by the Petitioners as not maintainable. According to him, the order issuing exemption certificate in favour of the Respondents passed under section 8-B of the Act, nevertheless, takes the colour of quasi-judicial proceedings as can be discerned from the opinion recorded by the Division Bench of this Court in the case of Kerba Dattu Borachate and others v. Shri Sheshashai and Vishnu Trust, reported in 1990 Mh.L.J. 1183.

3. On the other hand, Mr. Naik, for the Respondent, has supported the order passed by the Sub-Divisional Officer. According to him, the Sub-Divisional Officer has rightly rejected the

objection regarding maintainability of the application, as the previous application was admittedly dismissed for default; and if it is so, the principles of res judicata are not attracted. To support this proposition, reliance is placed on the decision of the Apex Court reported in A.I.R. 1969 S.C. 971 in the case of Shivashankar Prasad Sah v. Baikunth Nath Singh and another decision of our High Court reported in 1999(3) Mh.L.J. 86 in the case of Nyaneshwar Bhiku Dhargalkar v. Executive Engineer, P.W.D., Goa. He further submits that insofar as the conclusion reached by the Sub-Divisional Officer that the applicant has fulfilled all the provisions of section 88B of the Act is concerned, the same is unquestionable as the same is supported by the evidence on record. He further submits that remedy of revision is not available against the order such as the one passed under section 88B of the Act.

4. Having considered the rival submissions, to my mind, it will not be necessary for me to address in depth the later two contentions canvassed before me, inasmuch as I have no

hesitation in accepting the argument of Mr. Karandikar that since the earlier application for issuance of exemption certificate under section 88B of the Act has been dismissed for default on 30th March 1970, subsequent application for the same relief cannot be maintained in law. Mr. Karandikar has rightly pressed into service exposition of this Court in Trimbak Purushottam Patil's case (supra). In para 6 of the said decision, this Court has observed that in respect of tenancy proceedings, principles underlying O.23, r. 1, C.P.C., can be invoked. Applying the same analogy, I have no difficulty in accepting the argument that in proceedings under the Tenancy Act, principles underlying O.9, r. 9, C.P.C., can be invoked, which, in turn, would be upholding the public policy of not permitting the litigant to take out successive applications for the same relief. Viewed in this perspective, it necessarily follows that the second application, from which the present proceedings have emanated, could not have been maintained and the same ought to be dismissed at the threshold on the above reasoning. If it is so, it will not be necessary for me to dwell upon the other

contentions as to whether the revision application filed by the Petitioners was maintainable, or, for that matter, whether the order passed by the Sub-Divisional Officer holding that the applicant has fulfilled all the provisions of section 88B of the Act can be sustained in fact or in law.

5. To get over the above position, Mr. Naik, however, contended that the objection of the Petitioners to the maintainability of the proceedings was on the argument of application of principles of res judicata. He submits that if the earlier application is dismissed for default, as has happened in the present case, then, in view of the enunciation of the Apex Court in Shivashankar Prasad Shah's case (supra), as well as of our High Court in Nyaneshwar's case (supra), the question of attracting the principles of res judicata does not arise. However, this submission overlooks that the main objection of the Petitioners was to the maintainability of successive application. Indeed, the Sub-Divisional Officer has proceeded to examine the same on the touchstone of the

principles of res judicata, but the fact remains that, in essence, the objection was to the maintainability of application as such. That objection will have to be accepted on application of principles underlying O.9, r. 9, C.P.C., that if the earlier application is dismissed for default, it is not open for the litigant to take out another application for the same relief. In the present case, the inquiry under section 88B was invoked, as it was urged before this Court that such an application for that relief was not filed on behalf of the Trust. That statement was made before this Court in December 1978, whereas, in fact, the Respondent had already made application for that relief under section 88B which application came to be dismissed on 30th March 1970. It is now brought to my notice that, in fact, Respondent had filed one more application on 18th December 1972, for the same relief under section 88B and in that application, filing of earlier application is disclosed. However, no such disclosure has been made in the subject application. Thus, the filing of earlier application in December 1970 has not been disclosed by the Respondent in the present

application (third in point of time) or before this Court in the earlier round of proceedings. Be that as it may, assuming that the second application, copy of which was tendered during the course of arguments by the learned Counsel for the Petitioner, was not filed, the fact remains that the earlier application was filed by the Respondent, which was dismissed for default on 30th March 1970 and that order having attained finality, it was not open to maintain the second application for the same relief. Further, merely because this Court permitted the Respondent to make application under section 88B of the Act, that does not mean that such application can be decided de hors the issue of non-maintainability of such application in law. In fact, the liberty granted by this Court was because of the misrepresentation made that no application under section 88B was filed. This by itself would disentitle the Respondent Trust to maintain any application. Hence, this petition succeeds. The impugned judgment and order is set aside and the application filed by the Respondent under section 88B of the Act, which was numbered as case No. 1 of 1981 is hereby dismissed. Rule made absolute.

No order as to costs.

6. In view of the present order, the earlier proceedings under section 32G of the Act, which have attained finality, will proceed and be given effect to in view of the observations made by this Court in the earlier judgment dated 14th/15th December 1978. No order as to costs.

7. Parties to act on the authenticated copy of this order.

(A.M.KHANWILKAR,J.)